We hereby certify that we have examined the foregoing petition; that in our opinion the said petition is well founded and entitled to favorable consideration, and that it is not filed for the purpose of hindrance or delay.

Benicio F. Sánchez
Harry Manuel Besosa

SUPREME COURT OF THE UNITED STATES

Term

José Eduardo Casalduc,
Trustee in Bankruptcy, Petitioner

vs.

Antonio Díaz González, et al.,
Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT

The facts are fully set forth in the petition for the writ of certiorari to which reference is hereby respectfully made. (Petition p. 2 and 3).

OPINIONS OF THE COURTS BELOW

The opinion of the Circuit Court of Appeals is reported as "José Eduardo Casalduc, Trustee v. Antonio Díaz González et al" at 117 Fed. (2nd) 915. The said opinion appears on page 48 of the trans-

cript. The opinion of the District Court (R. p. 10) is not printed.

JURISDICTION OF THIS COURT

The judgment to be reviewed was rendered on February 18, 1941 (R. p. 48) and petition for rehearing was denied on March 20, 1941 (R. p. 51). Jurisdiction of this Court is invoked under sect. 240A of the Judicial Code as amended (28 U.S.C.A. sect. 347) and case **Gypsy Oil Co.** vs. **Escoe,** 275 U.S. 498, sustaining the right to file this petition within ninety days after rehearing has been denied.

SPECIFICATION OF ERRORS

Please refer to pages 3 and 4 of this petition.

STATUTE AND RULES INVOLVED

Sect. 1 of Act of June 22, 1938 (52 Stat. 855, 11 U.S.C.A. 48A):

"Appeals under this title to the Circuit Court of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia shall be taken within thirty days after written notice to the aggrieved party of the entry of judgment, order, or decree complained of, proof of which notice shall be filed within five days after service or if such notice be not served and filed, then within forty days from such entry."

Federal Rule of Civil Procedure 6A: "In computing any period of time prescribed or allowed by these rules, by order of the court, or by any applicable statute, the day of the act, event or

default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday... A half holiday shall be considered as other days, and not as a holiday."

Federal Rule of Civil Procedure 73A: "When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from the judgment by filing with the district court a notice of appeal."

Federal Rule of Civil Procedure 77A: "The district court shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process and of making and directing all interlocutory motions, orders and rules."

Federal Rule of Civil Procedure 77C: "The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays and legal holidays."

Federal Rule of Civil Procedure 83: "Each district court by action of the majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by district court shall upon their promulgation be furnished to the Supreme Court of the United States."

Rule 41 of the United States District Court for Puerto Rico (R. p. 38): "The office of the clerk of this court shall be kept open every day from 8:30 o'clock a.m. to 12:00 o'clock, and from 1:30 p.m. to 5:00 p.m. except Sundays and legal holidays. On Saturdays he shall keep his office open until noon."

ARGUMENT

A. The Honorable Circuit Court of Appeals by dismissing appeal for want of jurisdiction violated **Sect. 1 of Act of June 22, 1938** (52 Stat. 855, 11 U.S. C.A. 48A) as it in fact reduced the period of forty days which the appellant had to thirty-nine and one half days (39½ days), having ruled that the clerk's office being closed, the lodging of the appellant's notice of appeal on Saturday afternoon in the said office from 2:00 to 4:00 p.m. September 14, 1940, was out of time. The Honorable Circuit Court ruled: **"On these facts** we hold that the notice of appeal was not filed with the District Court on September 14 . . . " (R. p. 49) "A person wishing to file a notice of appeal after closing hours on the last day may seek out the clerk or deputy clerk, or perhaps the judge and deliver the notice to him out of doors. The notice of appeal would then be filed within the statutory period." (R. p. 51).

For additional reasons why the above mentioned Federal statute was violated and error thus committed, please also consider subsequent points herein argued.

B. The Circuit Court violated **Federal Rule of Civil Procedure 6A.** The opinion of the Circuit Court states:

"The District Court had full authority to provide by rule for the closing of the clerk's office

> on Saturday afternoon. Rule 6A of the Federal Rules of Civil Procedure, if it applies at all to the jurisdictional statute, gives the appellant no support, for the rule recognizes the existence of half holidays and provides that in spite of the closing of offices during half of the day, no additional time will be allowed for the filing of a paper."

Rule 6A states only that Sundays and legal holidays are to be excluded, and that half holidays are not to be considered holidays. Saturday, therefore, in accordance with this rule is a full working day and should be totally included (within business hours) in the designation of a period. The Honorable Circuit Court, therefore, by shortening the last day of the appellant's period for appeal by eliminating Saturday afternoon disregarded the above rule.

The said Court quotes the case of **López** vs. **Cortéz,** 35 P.R. Reports 57, to hold that it is a long usage in Puerto Rico "that business hours on Saturdays do not extend through the afternoons." The said case decides just the contrary.

> "Although the custom of closing government offices during Saturday afternoons has been established, Saturday afternoons are not legal holidays." Court held that appellant should have perfected his appeal on Saturday afternoon.

This does not mean that people in the community do not keep their places of business open and transact business. Only the government offices close, says that decision. Our interpretation of the above decision is so plain that the appellant's right of appeal was lost because he did not take any steps to perfect his appeal on Saturday afternoon, which was the last day of the period.

C. The Circuit Court of Appeals violated **Federal Rule of Civil Procedure 73A,** for it held that the notice of appeal in this case was not filed on September 14 within the meaning of Rule 73A of the Rules of Civil Procedure (R. p. 49), citing in support of said contention the case of **Lewis Hall Iron Works** vs. **Blair** (Court of Appeals District of Columbia) 23 Fed. (2nd) 972, and the case of **W. J. White Company** vs. **Winton,** 41 Cal. App. 693, 183 Pac. 277 (R. p. 49).

The above cited cases are not in point with the above ruling and one of them even upholds our contention. Notice of appeal in the **Lewis Iron Work case** was filed at 7:30 p.m., clearly out of time, and certainly out of regular business hours of the court. We, on the other hand, did all that was required of us (see **Hoyt** vs. **Stark,** 66 Pac. 223, cited by the Supreme Court in **U. S.** vs. **Lombardo,** 241 U.S. 73; **Randall** vs. **Foglesong,** 200 Fed. 741; **Ginnochio** vs. **Hydraulic Press,** 266 Fed. 564) to file, and did lodge in court the said notice of appeal within reasonable business hours within the last half day of the statutory period, thus complying with said Rule 73A, which prescribes "within the time prescribed" and "filing with the district court."

In the **W. J. White** vs. **Winton** case, notice of appeal was left under the door after 5:00 p.m., which was the legal closing time. Court was duly closed and appellant had no right under any law or rule to expect that court would be open after 5:00 p.m., out of business hours. It is also important to cite this case in our favor because it establishes that delivery of the paper should be made to the proper officer at the proper place, the clerk's office, all in accordance with our contention based on Rule 73A, above stated.

The Honorable Circuit Court also held: (R. p. 50)

"A person wishing to file a notice of appeal

> after closing hours on the last day may seek out the clerk or deputy clerk or perhaps the judge, (but see **In re Gubelman,** 10 Fed. (2) 926,) and deliver the notice to him out of hours. The notice would then be filed within the statutory period."

The Circuit Court thus sustains a haphazzard method of running about to seek out the clerk to file a paper out of court; and had the appellant proceeded in this whimsical manner, the Honorable Circuit Court would have sustained the appeal.

The following cases also sustain our view: **U. S. vs. Lombardo** 241 U. S. 73, **In re Gubelman** 10 Fed. (2) 926, **Hoyt vs. Stark** 66 Pac. 223, **U. S. vs. Richard** & Co. 12 Court of Customs 2880, **Inhabitants of Town of Greenfield vs. Burnham** 145 N. E. 306, **Godchaux vs. Leon Boudreaux** 96 So. 532.

D. According to **Rule 77A** the District Court shall be deemed always open for the purpose of filing any pleading or other paper. There is no doubt that the object of this rule is to cover cases like ours where the clerk's office should have been open according to these same rules or where for any other reason as in cases of catastrophe or accidents the clerk's office might be destroyed or kept from opening. The prerogative of this rule should have been used by the Circuit Court in protecting us and correcting the date of filing as we requested. (R. p. 43).

E. **Rule 77C** provides that the clerk's office with a clerk or a deputy in attendance shall be open during business hours on all days except Sunday and legal holidays. The Circuit Court in its opinion (R. p. 50) decided:

> "The term "business hours" is not defined in the rule. In its natural sense, the term means those hours during which persons in the community

> generally keep their places open for the transaction of business. The long usage in Puerto Rico, as in many other places, is that business hours on Saturdays do not extend to the afternoon. See **López** vs. **Cortéz** 35 P. R. Reports 577. The district court has full authority to provide by rule for the closing of the clerk's office on Saturday afternoon."

In the first place the long usage in Puerto Rico is that business hours extend through the afternoon of Saturday. The only authority the court quotes to sustain its view of such alleged long usage in Puerto Rico is the case of **Lopez vs. Cortez,** without any evidence to sustain it.

> **Lopez vs. Cortez,** 35 P. R. R. 577: "Although the custom of closing government offices during Saturday afternoons has been established, Saturday afternoons are not legal holidays." Appellant in this case lost his appeal for not having perfected it during Saturday afternoon.

This case, as may be seen, says only that government offices are not open Saturday afternoons, but it does not establish that Saturday afternoons have no general business hours, or that people customarily do not transact business on such afternoons, so much so that appellant in the López vs. Cortéz case lost his appeal for not perfecting it on a Saturday afternoon.

In **Words and Phrases** under the definition of business hours, the case of **Derosia** vs. **Winona,** 18 Minnesota 133 is cited:

> "Business hours does not necessarily mean the hours of the day during which the company required its station agents's services, but the hours during which persons engaged in business in that

> community kept their places open generally for the transaction of business."

The fact that government offices and that the U.S. District Court of Puerto Rico might customarily not be open on Saturday afternoons does not mean that this by itself defines or establishes what business hours are on Saturday afternoons in this community, especially so when the Supreme Court of Puerto Rico by the above decision and the United States Supreme Court through its rules of Federal Practice has not eliminated Saturday afternoons as part of a business day. It may even be argued that usage may be disregarded or eliminated for certain purposes by a statute. "Lex scripta est". The district court however has the power to regulate, reasonably, its business hours during Saturday afternoons. The law plainly establishes that.

F. The Circuit Court violated **Federal Rule of Civil Procedure 83.**

The Court notwithsfanding the statute and rules appearing in our previous argument based its opinion, in dismissing our appeal, on preexisting Rule 41 of the District Court of Puerto Rico, which regulates the business hours of the court, and also provides that "on Saturday he (the clerk) shall keep his office open until noon." (R. p. 38)

(1) As may readily be seen from the above enumerated errors in this brief, **Rule 41** is inconsistent and in conflict with the Federal Rules of Civil Procedure.

U. S. vs. Curran, 297 Fed. 946:

> "Federal Court has the right to establish rules and regulate the conduct of the business of the court within its jurisdiction as conferred by law." See also **Washington Southern** vs. **Baltimore,** 263 U. S. 629; **Alaska Packers** vs. **Pillsbury,** 301 U.S. 174.

In this case the law applicable is statute 11 U.S.C.A. 48A together with Federal Rules of Civil procedure 6A, 73A, 77A, 77C, and 83. Based on the above, the District Court has power to regulate by its own rules its business hours, but it cannot restrain the extension and meaning of a statute by eliminating part of the statutory period. The court may, therefore, regulate the opening and closing hours during Saturday afternoon by establishing that the clerk's office on Saturday afternoons be open, say, from 1:30 to 3:00, or from 2:00 to 4:00, or from 3:00 to 5:00, but never restraining or narrowing down the appellant's right of forty days by totally eliminating a whole business afternoon, which in our case happened to be the last half day we had within the statutory period to file our notice of appeal. The District Court, therefore, has authority to regulate reasonably; but as in cases of "discretion", a court may use its discretion but may not abuse it.

(2) The Honorable District Court erred in not deciding that copies of pre-existing district court rules (including rule 41) had to be sent to the United States Supreme Court, thus deciding by omission that said pre-existing district court rule 41 was in effect and binding on this appellant. As a matter of fact, the records of this Supreme Court show that pre-existing rules for the District Court for Puerto Rico, including Rule 41, since their promulgation on May 12, 1926, have never been notified, nor copies of them ever sent to this Supreme Court. (See Exhibits A & B appended herein, p. 23, involuntarily not included by the Clerk of the Circuit Court in the transcript of the record, but certified by him on p. 25 infra).

Assuming that Rule 41 is not inconsistent with the Federal Rules of Civil Procedure already mentioned, Rule 83, however, also requires that copies of said rules (which include Rule 41) shall upon their

promulgation be furnished to the Supreme Court of the United States.

Advisory Committee's note to Rule 83 states:

"This rule substantially continues U.S.C. Title 28 sect. 731 (Rules of Practice in District Courts) with the additional requirement that copies of such rules and amendments be furnished to the Supreme Court of the United States."

Bouvier Law Dictionary vol. 3, page 313:

"The general rule in America is that an act takes effect from the time when the formalities of the enactment are actually complete."

In our case there is no evidence, in the first place, of any order by the district court after the enactment of the Federal Rules of Civil Procedure reviving or re-adopting the already existing rules of the district court which the said district court intended to continue and which were not inconsistent with the new rules. (**Altman vs. National Life Assurance,** 37 Fed. Sup. 414). In the second place, copies thereof were never sent to the Supreme Court. The formalities of enactment are thus clearly missing.

Even as far back as the case of the **Cotton Planter,** 1 Paine, 23 Fed. Case 3270, the following was established:

"With regard to trade, unless previous notice can be brought home to the party charged with violating their provisions, laws are to be considered as beginning to operate within their respective districts only from the time they are received by the collector."

State vs. Bruno 21 So. 30:

"The appointment of a jury commission and

the drawing of a jury by it, under a law which has not been promulgated, are void."

G. The Circuit Court erred in defining and interpreting the exact meaning of "**filing**" in the light of Supreme Court cases, **U. S.** v. **Lombardo** and **Mutual Life** v. **Phinnery**, already cited, by stating:

> "Filing" means delivery of the paper into the actual custody of the proper officer. **The Washington** 16 Fed. (2) 206,208; **Lewis Hall Iron Works v. Blair** 23 Fed. (2) 972,974 (R. p. 49: "A person wishing to file a notice of appeal after closing hours on the last day may seek out the clerk or deputy clerk or perhaps the judge (but see In re Gubelman 10 Fed. (2) 926, 929) and deliver the notice to him out of hours. The notice of appeal would then be filed within the statutory period."

The above rulings are clearly erroneous on the strength of the next two cases, cited by the Circuit Court to sustain such an assertion.

The Washington, 16 Fed. (2) 206:

> "**Filing** means the delivery of the thing to be filed into the actual custody of the proper officer keeping the records of the court. It connotes a deposit for permanent preservation."

The above decision clearly means that you must hand the paper to the clerk or the deputy who is at the time at the clerk's office in care of the records of the court, so that permanent preservation may immediately follow. From case U. S. vs. Lombardo, 241 U. S. 73, it is clear that in old times filing meant the piercing of the documents through a wire for presevation. This case also shows that it is necessary for fil-

ing to have the document in the clerk's office for immediate public exposition in order that the opposite party may at any time examine the said document to determine his rights in the case.

W. J. White Co. vs. **Winton,** 183 Pac. 277. In this case the notice of appeal was left under the door after 5:00 p.m., which was the closing hour. Court was duly closed and appellant had no right under any law to expect that court should be open after 5:00 p. m. This case, however, points out very clearly that it is not sufficient to deliver the paper to the proper officer at a place other than the office where it is required to be filed, even though the officer endorses it as properly filed. Thus in our case, following the wording of the statute which says "filing with the district court" and in accordance with the above case chosen by the Circuit Court and those of the Supreme Court cited, appellant was obliged to go to the clerk's office where the clerk or the deputy clerk was supposed to be on duty according to Rule 77C.

The Supreme Court of the United States has already clearly established what **filing** means.

U. S. Lombardo, 241 U. S. 73. Under the White Slave Traffic statute it was required "to file such statement concerning alien woman... with the Commissioner General of Immigration." It was contended in this case that the filing of such statement might not be at the office in Washington but might be deposited in the Post Office and thus forwarded through the usual course of the mail.

The Supreme Court said:

> "This contention cannot be reconciled with the language employed in the act. The word **file** is derived from the Latin word **filum** and relates to the ancient practice of placing papers on a thread or wire for safekeeping and ready reference."

"Filing, it must be observed, is not complete until document is delivered and received. Shall file means to deliver to the office and not send through the mails. A paper is filed when it is delivered to the proper officer and by him received and filed."

"A court is constrained by the meaning of the words of a statute. They mark the extent of its power." Cites **Hoyt vs. Stark** 134 Calif., 178, (66 Pac. 223), **Mutual Life vs. Phinney,** 76 Fed. 618, also reported in 178 U. S. 327.

In order to fix more definitely the meaning and extent of the above mentioned decision, we should refer to the case of Hoyt vs. Stark cited with preference by the Honorable Supreme Court in the Lombardo Case.

Hoyt vs. **Stark** 66 Pac. 223.
(Supreme Court of California)

"The office of the County Clerk for Santa Clara County was open at 9:00 a.m. and closed at 5:00 p.m. After the hour of 5:00 p.m. appellant's attorney went to the office of the County Clerk to file his undertaking upon appeal. It was the last day allowed him by law for this purpose. Finding the office closed, he went to a social club in the City of San José, where he found one of the deputy county clerks. To him he explained the circumstances. The deputy took the undertaking and endorsed it as filed upon that day and date. At 9:00 a.m. upon the following day, respondent's attorney visited the clerk's office, examined the proper books and registers, and found no record of the filing in the clerk's office of the necessary undertaking. Thereafter, the deputy county clerk to whom had been entrusted the undertaking, arriving at the office, delivered the bond to a Federal deputy, who placed it

in its proper receptacle and made in the proper books the entry of its filing. The single question thus presented is whether under sect. 940 of the Code of Civil Procedure, the undertaking was filed in time. That section in turn requires a filing "with the clerk of the court in which the judgment or order appeal is entered." As the only method by which the adverse party can acquire his knowledge is from an inspection of the proper records of the county clerk's office, it would seen inevitable to follow that the meaning of the law is that the appealing party shall offer for filing to the clerk at his office the requisite undertaking within due time. If he shall do this under the familiar principle that private rights will not be impaired by the failure of public ministerial officers to do their duty, upon the one hand he will not be compelled to see that the proper entries of filing are actually made... **Something more is contemplated than a haphazzard deliver to the officer wherever he may chance to be found.** In all cases the law has provided a proper officer and a known office in which he is to transact his official business. Regardless of the varying phraseology of the statutes, in contemplation of law a paper whose filing carries notice or affects private rights, is filed only when deposited with the proper officer at his office for this special purpose. Nor do we mean it to be understood, as has been said, that when proper filing or offer of filing has been made by a party, he shall suffer for the remissness of the clerk in the performance of his duty. But the proper offer means more than a mere presentation to the officer. It means a presentation to him at the proper place and within the proper time. When this has been done, the party is required to do no more, and he will not be

endangered in any of his rights by the failure of the clerk in turn to perform his duty."

Mutual Life vs. **Phinney**, 178 U.S. 327 confirming decision by the Circuit Court of Appeals, 9th Circuit, in 76 Fed. 617. In this case the following was established:

Page 336:

"While it is true that it did not show that a copy of the writ of error was received and filed by the clerk of the trial court, and while it is true that it did not show that the original writ of error was filed in his office, yet the affidavit made by the deputy clerk (which is not disputed) disclosed that it was so filed, and on the same day with other proceedings for perfecting the transfer of the case to the court of appeals." "... the affidavit of the deputy clerk who had charge of the office shows positively that it was left with him and filed."

Please note by the above decision how the deputy clerk may be the proper officer and not the clerk, just depending on who has actual charge of the office. Thus a paper handed to the clerk, even in time, but outside the office is not filed.

CONCLUSION

In summing up the above argument, the whole controversy may be boiled down to the following: From the Circuit Court decision, it is apparent that the time element was of only secondary importance to the Court, because if appellant had filed his notice of appeal at any hour on September 14, 1941 up to midnight, provided that the appellant had handed the notice of appeal to the clerk, wherever he might have been, even outside of court, such appeal would

have been accepted. Our appeal then would have been retained by the Court. If on the other hand, we had done it in the way the Court ruled in the said opinion, the opposite party surely would have objected because the established doctrine as may be seen from the above cases, is that notice must be filed on time, handed to the proper officer, and at the proper place.

We followed the established statutory requirements and the doctrine marked by the Supreme Court of the United States as far as it was possible for us to do it. We claim that we substantially complied with such requirements and nothing more can be required of us according to law.

As expressed in the **Mutual Life** vs. **Phinney** case above mentioned, the ruling of the Circuit Court was highly technical, the appellant not having caused any harm or injustice on the opposite party by the procedure that was followed in this case.

> **Mutual Life** vs. **Phinney,** 178 U.S. 327: "While we have always been careful to see that the required order of procedure has been complied with before any case shall be considered as transferred from a lower to a higher court, that the parties seeking review must act in time and must make **substantial compliance with all that the statute prescribes,** at the same time we have been equally careful to hold that no mere technical omission which did not prejudice the rights of the defendant in error should be made available to oust the appellate court of jurisdiction." (Page 337).

Respectfully submitted,

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Attorneys for petitioner.